

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF DELAWARE

3 AMO DEVELOPMENT, LLC, )  
4 AMO MANUFACTURING USA, )  
LLC, and AMO SALES AND )  
SERVICE, INC., )  
5 Plaintiffs, )  
6 v. ) C.A. No. 20-842-CFC  
7 )  
8 ALCON VISION, LLC, ALCON )  
LABORATORIES, INC., and )  
ALCON RESEARCH, LLC, )  
9 Defendants. )  
10  
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13 Friday, January 13, 2023  
1:00 p.m.  
14 Oral Argument  
15  
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17 844 King Street  
Wilmington, Delaware  
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BEFORE: THE HONORABLE COLM F. CONNOLLY  
United States District Court Judge

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL  
BY: JACK B. BLUMENFELD, ESQ.

-and-

1 APPEARANCES CONTINUED:

2

3 LATHAM & WATKINS  
4 BY: MICHAEL A. MORIN, ESQ.  
BY: RACHEL RENEE BLITZER, ESQ.  
BY: SARANG V. DAMLE, ESQ.

5 Counsel for the Plaintiff

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7

8 SHAW KELLER  
9 BY: JOHN W. SHAW, ESQ.

10 -and-

11

KIRKLAND & ELLIS  
BY: JEANNE M. HEFFERNAN, ESQ.  
BY: GREGG F. LOCASCIO, ESQ.  
BY: NOAH S. FRANK, ESQ.  
BY: RYAN MELD, ESQ.

14 Counsel for the Defendants

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1 P R O C E E D I N G S  
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3 (Proceedings commenced in the courtroom beginning at  
4 1:00 p.m.)

5 **THE COURT:** Good afternoon. Please be seated.

6 Mr. Blumenfeld.

7 **MR. BLUMENFELD:** Thank you, Your Honor.

8 Jack Blumenfeld from Morris Nichols for the  
9 plaintiffs. And with me at counsel table, all from Latham  
10 & Watkins, are Mike Morin, Sy Damle, and Rachel Blitzer.

11 **THE COURT:** Great. Thank you.

12 **MR. BLUMENFELD:** Thank you.

13 **THE COURT:** Mr. Shaw.

14 **MR. SHAW:** Good afternoon, Your Honor.  
15 John Shaw for defendants. Joining me at counsel table  
16 from Kirkland & Ellis, Gregg LoCascio, Jeanne Heffernan;  
17 and second row, Ryan Melde and Noah Frank. And then from  
18 Alcon, in the gallery, Jeff Prokop.

19 **THE COURT:** Okay. Thank you.

20 All right. So let's deal with the Stamm  
21 motion. All right?

22 **MS. HEFFERNAN:** Good afternoon, Your Honor.  
23 For the record, Jeanne Heffernan on behalf of Alcon.

24 The question here is whether Ms. Stamm's  
25 established the required causal nexus to recover indirect

1       profits for IOLs, intraocular lenses, which themselves  
2       indisputably do not infringe any of the asserted  
3       copyrights in the case. They don't contain any of the  
4       copyrighted materials.

5                  Ms. Stamm -- just to be clear, Ms. Stamm seeks  
6       indirect profits on other products as well, beyond just  
7       IOLs. That is not part of our motion. We will take that  
8       up at another time. We don't -- I just want to be clear  
9       for the record. We don't concede a nexus as to those  
10      other products.

11                 But focusing on the IOLs, what contains the  
12       infringing code here, the allegedly infringing code, is  
13       the LenSx laser. Intraocular lenses contain no source  
14       code. Alcon IOLs are not required --

15                 **THE COURT:** Let me stop you there. Here's the  
16       thing: So I actually -- I'll just tell you what gave rise  
17       to this. I was ready to write an opinion going your way.  
18       I think they're stretching the case law, but then I get to  
19       this Page 9 of their brief, and it throws me for a loop.

20                 It says that Stamm's opinion only included  
21       those IOL sales to customers who had purchased a LenSx,  
22       and only after the LenSx purchase had occurred.

23                 And I don't think -- and they save it for the  
24       end. It's like the last page, right. And I've got -- and  
25       then I thought, wait, this is different than I thought.

1 And if it's truly that narrow, then I'm thinking, well,  
2 what else is she supposed to do?

3 So where I am is, I don't really get the facts  
4 because neither of you kind of say, hey, here's a report,  
5 here's exactly what she says.

6 And so I -- that's why I said, you know what?  
7 I'm not going to spend any more time on this, I'm going to  
8 bring you all in, and let me figure out.

9 So do you agree that she is only including IOL  
10 sales, one, to customers who had purchased a LenSx; and  
11 two, only after the LenSx purchase had occurred?

12 Is that right?

13 **MS. HEFFERNAN:** That is correct, Your Honor.

14 **THE COURT:** Okay. Now, my second question,  
15 they don't answer and you don't answer this. So do these  
16 LenSx -- I don't know how these operations work, these  
17 doctor operations.

18 So in other words, if you're selling to a  
19 doctor's practice and all that doctor's practice does  
20 is -- what do you call it? FLAM --

21 **MS. HEFFERNAN:** FLACS.

22 **THE COURT:** FLACS, right. FLACS or FLACS, is  
23 that how you pronounce it?

24 **MS. HEFFERNAN:** Yes.

25 **THE COURT:** -- FLACS surgery, well, then that

1 seems pretty reasonable, what she's doing.

2                   On the other hand, if an individual practice is  
3 doing all sorts of other things, besides FLACS surgery,  
4 well, then I think that might be a problem, but it may not  
5 because it may not be possible for them to come up with  
6 anything more granular, that they're kind of stuck with  
7 the way you do your books.

8                   So do you get where I'm coming from now?

9                   **MS. HEFFERNAN:** I think I do.

10                  **THE COURT:** All right. So address those  
11 issues, please.

12                  **MS. HEFFERNAN:** Sure. So in these practice  
13 groups, one, the groups that have a FLACS machine, which  
14 could be any manufacturer's Femtosecond-Laser-Assisted  
15 cataract surgery machine, or LenSx accounts -- if we want  
16 to focus specifically on LenSx accounts for the moment --  
17 a LenSx can be placed into an account that is already  
18 doing maybe another manufacturer's FLACS surgery. You can  
19 have two different FLACS machines.

20                  **THE COURT:** Okay. So I could be, basically, an  
21 ophthalmologist --

22                  **MS. HEFFERNAN:** Yes --

23                  **THE COURT:** -- and I've got a bunch of  
24 different machines in my practice --

25                  **MS. HEFFERNAN:** Right.

1                   **THE COURT:** -- one room is LenSx, one room  
2 something else.

3                   **MS. HEFFERNAN:** Could have a Catalys in another  
4 room. Exactly.

5                   **THE COURT:** Right. Okay.

6                   **MS. HEFFERNAN:** Or the vast majority of the  
7 procedures at that specific surgery site could be done  
8 manually even in the presence of a FLACS machine, whether  
9 that's a LenSx or some other device. And in fact  
10 97 percent of surgeries worldwide are done manually.

11                  And even the doctors, who you'll hear from at  
12 trial who do FLACS surgeries, also do manual surgeries.  
13 And in some cases, have multiple FLACS devices at their  
14 accounts.

15                  **THE COURT:** All right. So all that weighs in  
16 favor of you with that. And I want to hear from them,  
17 obviously. But, you know, then I'd still be off to, okay,  
18 well, I think your motion has legs.

19                  But then what I'm going to guess they're going  
20 to come up with is, and I don't know, but -- because it's  
21 not in the papers, is, well, how do you do your books,  
22 right. And it may be -- like, I think they're stretching  
23 it.

24                  **MS. HEFFERNAN:** Right.

25                  **THE COURT:** You know, the case law is -- what

1 the case law says is, you can't use, basically, the gross  
2 revenue for the company. That's -- you know, we're not  
3 going to do that. Right?

4 **MS. HEFFERNAN:** Or even gross revenues for  
5 entire product line.

6 **THE COURT:** Well, see, that's where we need to  
7 get in. It could be. Like, I think if it's General  
8 Motors and it's the particular car, it may be because  
9 depends where the parts -- what else are they used for,  
10 right? It could be.

11 But I think Congress put this in the statute  
12 because it foresaw the difficulty with parsing these  
13 revenue numbers. And so there is somewhat, if you will,  
14 of a burden on the defendant. I mean, if you structure  
15 your books so that there is no way to parse this out,  
16 well, then that may be what this statute is all about.

17 So how do you book the revenue to a doctor's  
18 practice?

19 **MS. HEFFERNAN:** Before I get there, could I  
20 just continue to finish here your first?

21 **THE COURT:** Yes.

22 **MS. HEFFERNAN:** Because there's some more at  
23 play in the surgery site.

24 **THE COURT:** Okay.

25 **MS. HEFFERNAN:** So in addition to a FLACS

1 machine, whether you do FLACS or by manual, you've got  
2 other machines already in place at those surgery centers  
3 that are part of the cataract surgery procedure. You have  
4 phacoemulsification machines. You may have other products  
5 like a digital marking machine to help place an advanced  
6 technology IOL correctly into the capsule.

7 There are lots of other pieces of equipment  
8 that all make up part of the cataract surgery.

9 IOL is what gets implanted at the end. It is  
10 the only piece of equipment that the patient leaves with  
11 and has in his or her eye forever.

12 And the decision-making process for which IOL  
13 to implant, you'll hear from both sides' experts say, has  
14 nothing to do with the manufacturer of the FLACS machine.  
15 It has to do with what the patient requires. What kind of  
16 needs does that patient have for seeing at the end of the  
17 cataract surgery.

18 **THE COURT:** Right.

19 **MS. HEFFERNAN:** So those IOLs, not tied one to  
20 one with a manufacturer of a FLACS machine --

21 **THE COURT:** Right. I've got that.

22 **MS. HEFFERNAN:** -- or any other machine.

23 **THE COURT:** Right.

24 **MS. HEFFERNAN:** And, in fact, the sales  
25 procedure, kind of getting to your second question, is --

1 for IOLs, is to, all of the manufacturers of IOLs, place  
2 their IOLs on consignment at surgery centers and  
3 hospitals. The hospitals don't actually buy the lenses  
4 from the outset at all.

5                   **THE COURT:** It's only when they use them.

6                   **MS. HEFFERNAN:** It's only when they're used.  
7 And when they're used, they're used based on the doctor's  
8 decision for that particular patient and that patient's  
9 needs, not based on the FLACS machine or --

10                  **THE COURT:** All right. Now, let me just ask  
11 you, if the experts address this: Do you have exclusive  
12 supply arrangements, such that if you're Dr., you know,  
13 Smith, you've got your practice, you're only buying IOLs  
14 from one supplier?

15                  **MS. HEFFERNAN:** That's not how it happens.

16                  **THE COURT:** No.

17                  **MS. HEFFERNAN:** There's no evidence of that in  
18 the record at all. In fact, the evidence is just the  
19 opposite.

20                  For example, for Alcon -- and I'm sure they'll  
21 talk about J&J and their practices. But for Alcon, the  
22 salesperson who goes in to sell a FLACS, the LenSx,  
23 doesn't have responsibility for IOLs or any other piece of  
24 equipment. And, in fact, the surgical side that has the  
25 FLACS devices, the LenSx devices in them, totally separate

1 business at Alcon from the IOL business.

2                   **THE COURT:** All right. Let me put the breaks a  
3 little there, okay? Because, you see, this is what I  
4 meant, I want oral argument. There's something to their  
5 side.

6                   You've got PowerPoints. You definitely think  
7 that LenSx sales drive IOL sales.

8                   Now, they go too far, you know.

9                   **MS. HEFFERNAN:** Right.

10                  **THE COURT:** I get that. And my only question  
11 is: Are they going too far, though, because your books  
12 don't allow for parsing, in which case then, I think we're  
13 going to have to look at this statute. Because this  
14 statute contemplates, right, that burden shift at some  
15 point.

16                  Agreed?

17                  **MS. HEFFERNAN:** I agree. I agree, but the  
18 burden shift is not at the causal nexus step.

19                  **THE COURT:** All right. Well, let's get to the  
20 facts first. So let's go with the facts.

21                  **MS. HEFFERNAN:** Let me go back to the anchoring  
22 documents.

23                  **THE COURT:** Yeah.

24                  **MS. HEFFERNAN:** Okay. There's no question,  
25 those documents are there and that language is used. What

1 those documents show is some correlation. Causation? No.  
2 They do not establish causation. They do show  
3 correlation.

4           **THE COURT:** Okay.

5           **MS. HEFFERNAN:** Which is why, Your Honor, we  
6 did not move on the \$772-million figure Ms. Stamm  
7 calculates based on those documents.

8           **THE COURT:** Right. But then I want to know:  
9 How do you come up with the 40 percent, or whatever the  
10 percentage was? What was it? It's been a couple weeks.  
11 Yes, 40 percent of U.S. --

12           **MS. HEFFERNAN:** Are you going to the -- oh, the  
13 deductions that Ms. Davis takes, the 38 percent?

14           **THE COURT:** Is that what she's getting that  
15 from? Is she basically getting 772 from the PowerPoint?

16           **MS. HEFFERNAN:** No, no, no. No, not -- no.

17           **THE COURT:** All right.

18           **MS. HEFFERNAN:** So Ms. Stamm calculates  
19 \$511 million of what she calls "pull-through sales," so --  
20 allegedly with a causal nexus. We disagree; say it's  
21 correlation, not causation.

22           She arrives at the 511 by using those documents  
23 you just referred to, Your Honor.

24           **THE COURT:** Okay.

25           **MS. HEFFERNAN:** In her reply report, she does a

1 totally different set of calculations not based on those  
2 documents; instead, she bases them on the difference, the  
3 delta in IOL penetration at surgery centers or accounts  
4 that have an Alcon phaco machine and a LenSx machine on  
5 the one hand, and accounts that have an Alcon phaco  
6 machine and a J&J Catalys on the other.

7 She does a comparison between those two  
8 accounts in terms of the penetration of IOLs that are sold  
9 into each of those accounts and does a calculation based  
10 on that to say, there is pull-through of \$772 million at  
11 accounts where there is a LenSx placed with an Alcon  
12 phaco, versus accounts where there's a J&J Catalys placed  
13 with an Alcon phaco.

14 Again, we say that's correlation, not  
15 causation. But she performs that calculation.

16 For sake of this motion, we don't challenge  
17 that. We do challenge the merits of that, but that's not  
18 what we have before Your Honor.

19 The only thing we have before Your Honor is her  
20 3.1-billion-dollar calculation, and that's because it's  
21 legally flawed. That's the calculation where Ms. Stamm  
22 says, "I can show you pull-through for the entire pot of  
23 IOL revenues of 3.1 billion dollars" --

24 **THE COURT:** Right. But that 3.1 -- this is  
25 what I didn't get until I got to Page 9 of their brief.

1 That 3.1 is two customers who had purchased a LenSx, and  
2 it includes revenue from those customers only after they  
3 purchased the LenSx.

4 Is that right?

5 **MS. HEFFERNAN:** Yes. But, Your Honor, may I  
6 add to that?

7 **THE COURT:** Hold on.

8 **MS. HEFFERNAN:** Okay.

9 **THE COURT:** So then, tell me about now -- and  
10 don't answer anything else. I only want to know --

11 **MS. HEFFERNAN:** Okay.

12 **THE COURT:** -- what do your revenue books look  
13 like that you give to them?

14 Like, in other words --

15 **MS. HEFFERNAN:** Right.

16 **THE COURT:** -- and if you could put one on the  
17 screen, that would be great.

18 Is there a way that they could break that down,  
19 or is it, no, you just have IOLs -- I get some IOL sales.  
20 I'm going to tell you right now, they should be allowed to  
21 put in front of the jury that there's a connection between  
22 some IOL sales and LenSx sales. I think that's fair. All  
23 right.

24 Now, should they be allowed to put the entire  
25 revenue of the business? Of course not. I think that's

1 what the case law is really clear about, right?

2 And then the only issue is: Should they be  
3 allowed to put the entire IOL sales in front of the jury?

4 And that could be misleading, and I think it  
5 could be wrongly admitted under the law. But where are  
6 you going to draw the line?

7 So tell me. Show me your books or tell me.

8 **MS. HEFFERNAN:** So in terms of -- they are  
9 separate books between the LenSx and the IOLs. And both  
10 at J&J and at Alcon, neither company tracks IOL deductions  
11 on an IOL basis. Like, they don't do it on a product  
12 basis. So the P&Ls at both J&J and Alcon are not done at  
13 the product level basis. They're done at the business  
14 level basis.

15 And so that's why, for example, when we analyze  
16 our deductions, our expert Julie Davis, which is the  
17 subject of their *Daubert* motion, has to use a document  
18 that created those P&Ls specifically for a particular  
19 purpose.

20 And we'll get into that. I think Mr. Damle is  
21 arguing that motion later.

22 **THE COURT:** Oral argument now --

23 **MS. HEFFERNAN:** Okay.

24 **THE COURT:** We've got to get this one done.

25 **MS. HEFFERNAN:** Sure. But --

1                   **THE COURT:** So I want to see how it affects  
2 that one.

3                   **MS. HEFFERNAN:** But I think what's important  
4 here in terms of sales of the IOLs, is that Ms. Stamm  
5 admits that not every IOL sold into a LenSx account is  
6 even used with a LenSx.

7                   **THE COURT:** Why is that compelling? Why does  
8 that matter?

9                   **MS. HEFFERNAN:** Because there's no connection  
10 at all that that --

11                  **THE COURT:** But why --

12                  **MS. HEFFERNAN:** -- between the LenSx and the  
13 IOL.

14                  **THE COURT:** But, see, this is where I think --  
15 let's go back to the statute, right.

16                  504(b) says, quote, "In establishing the  
17 infringer's profits, the copyright owner is required to  
18 present proof only of the infringer's gross revenue, and  
19 the infringer is required to prove his or her deductible  
20 expenses in the elements of profit attributable to factors  
21 other than the copyrighted work."

22                  Now, for profits. You know, the statute  
23 doesn't define what gross revenue is. The sentence that  
24 immediately precedes this sentence in 504(b), says, quote,  
25 "The copyright owner is entitled to recover the actual

1 damage suffered by him or her as a result of the  
2 infringement."

3 **MS. HEFFERNAN:** Right.

4 **THE COURT:** Right? So I think if you're  
5 selling, I mean -- and what is it? Convoyed sales in the  
6 patent context. You can get -- recover profits for  
7 convoyed sales, right?

8 **MS. HEFFERNAN:** We don't disagree with that.

9 **THE COURT:** Right. All right.

10 **MS. HEFFERNAN:** If the proof is there.

11 **THE COURT:** Yeah, yeah. All right. So then,  
12 you don't dispute that.

13 So now let's focus on this second sentence.

14 "In establishing the infringer's profits, the copyright  
15 owner is required to present proof only of the infringer's  
16 gross revenue, and then the infringer is required to prove  
17 deductible expenses and elements of the profit  
18 attributable to factors other than copyright work."

19 **MS. HEFFERNAN:** That's right.

20 **THE COURT:** So...

21 **MS. HEFFERNAN:** So I would -- I think the  
22 Courts have read that statute by reading the sentence you  
23 read before, the profits, 504(b), which is, the revenues  
24 have to be, I think, "attributable to, reasonably related  
25 to."

1                   **THE COURT:** Reasonably related to. I agree  
2 with that.

3                   **MS. HEFFERNAN:** Reasonably related to --

4                   **THE COURT:** Right. But IOLs -- let's put it  
5 this way: IOLs used for FLACS surgery with a LenSx are  
6 very reasonably attributable, right?

7                   **MS. HEFFERNAN:** No. No, they are not.

8                   **THE COURT:** Really?

9                   **MS. HEFFERNAN:** Because the same IOL,  
10 97 percent of the time, is used in a manual surgery.  
11 There's no causal connection between --

12                  **THE COURT:** I posited a causal connection. I  
13 said, "IOL used in FLACS surgery with a LenSx are  
14 reasonably attributable."

15                  You don't even agree with that?

16                  **MS. HEFFERNAN:** Not the way that "reasonably  
17 attributable" has been understood by the case law.

18                  (Cross-talking.)

19                  **THE COURT:** So you would have no convoyed  
20 sales. You would say IOLs are -- they're out 100 percent,  
21 you can never have an IOL.

22                  **MS. HEFFERNAN:** Yes. Yes. Unless there's some  
23 evidence that we have not seen in this case that  
24 customers, doctors, are making purchasing decisions. And  
25 in this case, because everything is on consignment, the

1 decision to actually implant a particular IOL, because of  
2 the code in the LenSx device.

3                   **THE COURT:** Your own documents say that LenSx  
4 drives and leverages IOL sales. How can you stand here  
5 and say, no, we don't count any IOLs?

6                   **MS. HEFFERNAN:** I can say that because those  
7 documents, at best, show a correlation. It's sort of  
8 like --

9                   **THE COURT:** Drive? Drive is not a correlation.

10                  **MS. HEFFERNAN:** Well, sure, but those documents  
11 also are marketing documents that were created with 504(b)  
12 in mind.

13                  **THE COURT:** No, they were created by people --  
14 you're right. They weren't thinking about a lawsuit.  
15 They're thinking about just reality.

16                  **MS. HEFFERNAN:** They were thinking about ways  
17 to get more investment in their business and arguing that  
18 there is this correlation, so we should get more  
19 investment into your business. But you have to --

20                  **THE COURT:** Wow. So you're going to take the  
21 position that IOLs, period, are out. Okay.

22                  **MS. HEFFERNAN:** Unless they can demonstrate a  
23 causal nexus, which is their burden. And once they  
24 demonstrate a causal nexus, only then does the burden  
25 shift to the defendant to prove deductions and also do an

1 apportionment, which is the second part of the statute  
2 that Your Honor read.

3                   **THE COURT:** Can you cite a case for me that  
4 says that the reasonably attributable test is causal  
5 based?

6                   **MS. HEFFERNAN:** Sure. I think that I can cite  
7 *Leonard v. Stemtech*. Let me go to that.

8                   *Leonard v. Stemtech* is 834 F.3d 376 out of the  
9 Third Circuit in 2016.

10                  **THE COURT:** Right. And it says, quote, "Courts  
11 interpret 'gross revenue' to mean 'the gross revenue that  
12 is reasonably related to the infringement.'" They're  
13 quoting Graham.

14                  Do they say anything about causality?

15                  **MS. HEFFERNAN:** They do. If you go further, it  
16 says, "Under 504(b), we use a two-step framework for  
17 recovery of indirect profits," which is what we're talking  
18 about here, citing Graham again. "First, the plaintiffs  
19 must demonstrate a 'causal nexus' between the infringement  
20 and the infringer's gross revenue."

21                  **THE COURT:** That's the infringement. I get  
22 that. But it's the second part. I mean -- and then we've  
23 got to figure out -- I mean, clearly, they've got to  
24 establish that they made money from the sales from their  
25 revenue, which would include the LenSx sales.

1                   **MS. HEFFERNAN:** Right.

2                   **THE COURT:** You're saying every single aspect  
3 of it, there has to be a causal nexus.

4                   **MS. HEFFERNAN:** For the indirect infringement,  
5 absolutely, for the IOLs --

6                   **THE COURT:** Okay. And then how would you --

7                   **MS. HEFFERNAN:** -- because, otherwise, it would  
8 be easier to get -- it would be easier to get damages for  
9 IOLs than it would be for the LenSx itself, I mean, at  
10 some point.

11                  **THE COURT:** Well, at some point. That's where  
12 I want to draw the line. But it's interesting, you want  
13 to draw the line at zero.

14                  **MS. HEFFERNAN:** In this -- under these  
15 circumstances and the facts and the evidence in the case,  
16 especially with their own experts saying, "That's not how  
17 I make my purchasing decision."

18                  We actually have, in this case, customers,  
19 consumers who talk about their purchasing decisions.  
20 Their own experts.

21                  **THE COURT:** So that seems to be the  
22 quintessential factual issue. You've got your own  
23 internal documents from your marketing people that are  
24 saying, "IOL sales are driven by LenSx."

25                  Then why don't we just let the jury decide

1 that?

2                   **MS. HEFFERNAN:** Okay, Your Honor. That's why  
3 we did not move on the 511 or the 772. But the  
4 \$3.1 billion is an entirely different kettle of fish.  
5 And, in fact, those documents and her -- Ms. Stamm's  
6 reliance on those documents to make her 511-million-dollar  
7 calculation belies the notion that there is any causal  
8 nexus to the \$3.1 billion.

9                   She can only show, at best -- and we're giving  
10 her this, for purposes of this motion -- a correlation  
11 which she says is a causal nexus to \$511 million, or  
12 alternatively, \$772 million.

13                   The fact that she can perform that analysis for  
14 that chunk of IOL revenues undercuts her alternative step,  
15 which is to grab the whole kettle of fish.

16                   **THE COURT:** So I was with you. Like I said, I  
17 wrote it up without a clerk. I wrote it myself. I was  
18 like, this is -- I can do this. And then I get to this  
19 one sentence, though. And this is where I kind of lose  
20 you. And maybe you just have to -- I don't know if you  
21 brought a PowerPoint, but make a better argument for me  
22 because they are limiting the universe. And that's where  
23 I'm just wondering, well, should we just let the jury  
24 decide then.

25                   Because what they're saying is, hey, we --

1 Alcon, they're telling us, LenSx drives IOL sales, so  
2 therefore, let's only count the IOL sales for Alcon  
3 customers who bought a LenSx and we'll limit it to the  
4 IOLs they bought after the LenSx.

5 Now, I still think it includes too much, right?  
6 Because it includes the hand surgery, it includes the  
7 surgery done with other machines, not LenSx.

8 But then, do you give them any basis or any  
9 means by which they can pair that down?

10 **MS. HEFFERNAN:** They did, Your Honor.

11 **THE COURT:** Well --

12 **MS. HEFFERNAN:** They paired down the  
13 \$3.1 billion to, alternatively, 511 or 772.

14 **THE COURT:** Right.

15 **MS. HEFFERNAN:** And by doing that, they have  
16 some evidentiary basis. Jury can sort that out, unless  
17 we, you know, get it JMOL.

18 **THE COURT:** Right. I guess the question,  
19 though, is: You're okay with them doing the 772 --

20 **MS. HEFFERNAN:** I'm not okay with it, but, I  
21 mean, we didn't move against that. It's not part of our  
22 motion, and we footnoted that to make that clear.

23 **THE COURT:** It is clear.

24 But my question, though, is: Well, is there  
25 something between 772 and 3.1 billion that they should be

1 allowed to bring in?

2                   **MS. HEFFERNAN:** Absolutely not. They've got no  
3 evidence for it, and if they had, we would have seen it.

4                   **THE COURT:** Okay. How do they get the 772 --  
5 would your -- is your position going to be the 772 is the  
6 gross revenue that's referenced in 504(b)?

7                   **MS. HEFFERNAN:** We are going to challenge that  
8 at trial with their own witnesses who will say there isn't  
9 a causal nexus in their purchasing decisions. So they  
10 will -- yes, they will come into trial, if Your Honor  
11 permits them to, and make that argument that the 772 is  
12 the gross revenue.

13                  **THE COURT:** Well, if I -- I thought you're not  
14 moving to preclude them from making a 7 --

15                  **MS. HEFFERNAN:** We are not moving to preclude  
16 them from making that.

17                  **THE COURT:** Okay. Well, since you're not, I'm  
18 not going to preclude them either.

19                  **MS. HEFFERNAN:** Okay. Fair enough.

20                  **THE COURT:** All right. So my question is  
21 then -- and then what you're going to do, apparently, is,  
22 you're going to just say, there is no 772 because there's  
23 no causality at all.

24                  **MS. HEFFERNAN:** That's right.

25                  **THE COURT:** Are you going to try to show

1 deductible expenses or elements of profit attributable to  
2 factors other than the copyrighted work?

3 **MS. HEFFERNAN:** Absolutely.

4 **THE COURT:** Okay.

5 **MS. HEFFERNAN:** And we have that in Ms. Davis'  
6 report.

7 **THE COURT:** Just give me a second.

8 Okay. Anything else?

9 **MS. HEFFERNAN:** I think I'll stop there, with  
10 the opportunity to stand up after my colleague does --

11 **THE COURT:** Okay.

12 **MS. HEFFERNAN:** -- sits down.

13 **THE COURT:** Okay.

14 **MS. HEFFERNAN:** Thank you.

15 **MR. DAMLE:** Good morning, Your Honor. Sy Damle  
16 for the plaintiffs.

17 **THE COURT:** All right.

18 **MR. DAMLE:** I'd like to start with just a  
19 couple of factual points.

20 One is, I think we're on common ground of  
21 \$3.1 billion in IOL revenues, is limited to IOL sales to  
22 LenSx accounts after the LenSx was placed. And I  
23 apologize that we didn't make that clear earlier.

24 **THE COURT:** No, no, no. In fact, you probably  
25 didn't know, but what -- and I probably misstated.

1                   What's not clear -- and it's only now that I  
2 want to hear what you have to say -- is, so what's a LenSx  
3 account?

4                   And -- so do you agree that a LenSx account  
5 could be a practice that has one LenSx machine that only  
6 does a minority -- or that is only used in a minority of  
7 the surgical procedures?

8                   **MR. DAMLE:** That is a possibility, Your Honor.

9                   **THE COURT:** That's a problem for you. Because,  
10 see, that's the thing, is -- and that's -- when I got to  
11 this page, I stepped back and I said, "Whoa, wait. I may  
12 have been misinterpreting this."

13                  **MR. DAMLE:** Your Honor, I think, just to answer  
14 the second -- sort of, the factual question that you had,  
15 which is: We don't have the level of granularity in order  
16 to be able to disentangle that.

17                  **THE COURT:** Well, how did you come up with 772?

18                  **MR. DAMLE:** Okay. So the 772 was really a  
19 response to an argument to a point that their expert had  
20 made. Their expert tried to disprove any causal  
21 relationship between a sale of a LenSx and IOL sales.

22                  And so she did this analysis that compared IOL  
23 penetration at -- LenSx accounts with IOL penetration at  
24 Catalys accounts and came up with a number. And she  
25 dismissed that number as -- you know, only four percentage

1 points.

2 Ms. Stamm did the math -- and this is really an  
3 apportionment analysis, not a -- not an effort to  
4 determine gross revenue. It was what is the causal -- how  
5 much of the revenue is actually caused by the placement of  
6 the LenSx, right. That's an apportionment analysis.

7 What she found, after doing that, looking at  
8 that and doing the math, she said that adds up to 772.  
9 That's a very different inquiry than the gross revenue  
10 inquiry that is really our burden.

11 The 772 really goes to their burden.  
12 Disentangling how much of the effect of the placement is  
13 caused by the LenSx and how much is caused by other  
14 factors. That's their burden.

15 **THE COURT:** Yeah. My sense is that you read --  
16 you take too much liberty with the case on that. Not with  
17 indirect gross revenue figures...

18 **MR. DAMLE:** Well, if I could discuss --

19 **THE COURT:** You know, I just don't think you  
20 get to start with, oh, they had \$3.1 billion worth of --  
21 for instance -- let me step back.

22 What's their total IOL sales; do you know?

23 **MR. DAMLE:** \$13 billion for -- across their  
24 entire company. Yeah, 13 billion.

25 **THE COURT:** What's J&J's IOL sales?

1                   **MR. DAMLE:** It's less. It's definitely less.

2                   **THE COURT:** Do you have any idea? Is it  
3 billions?

4                   **MR. MORIN:** I would say, Your Honor -- I'm very  
5 careful to be precise in court, so let me say it's a  
6 guess -- a lower market share than them, but yes,  
7 billions.

8                   **THE COURT:** Okay. All right. So we think it's  
9 \$13 billion, and then you narrow it down to 3.1 billion --

10                  **MR. DAMLE:** Correct.

11                  **THE COURT:** -- basically, those are the LenSx  
12 accounts.

13                  **MR. DAMLE:** Those are the LenSx accounts.

14                  **THE COURT:** Right.

15                  **MR. DAMLE:** And then the burden shifts to them  
16 to say, well, only X percentage of them were actually used  
17 in a LenSx procedure. We don't have that data. That's  
18 really their burden.

19                  And if I could just talk about the Volkswagen  
20 case, because I think that's probably the most instructive  
21 case. That was in the Eighth Circuit, but adopted -- the  
22 reasoning was adopted by the Third Circuit.

23                  So in that case, the plaintiff put forward  
24 gross revenues for all Audi TT sales in the country during  
25 the period of time the infringing commercial ran. That

1 was \$153 million, that we only ultimately got 570,000 of  
2 that, but he was able to start with \$153 million.

3                   The defendant made almost exactly the argument  
4 that Alcon is making here, that: Look, not all sales are  
5 made -- are caused by somebody watching a commercial.  
6 Lots of other reasons. Brand loyalty, reputation. All of  
7 that. Same things they point to.

8                   The Court said -- rejected that argument and  
9 said they'd satisfied the burden using circumstantial  
10 evidence, that there was a reasonable relationship between  
11 the infringement, the commercial, and the category of  
12 revenue, sales of Audi TTs in the country.

13                  And it said that even as it acknowledged that  
14 there were likely people who had never seen the  
15 commercial. They said part of the people -- part of that  
16 \$153 million of gross revenue included people that bought  
17 the car without even seeing the commercial, and probably  
18 included people that were not influenced by the commercial  
19 even if they did see it. But it didn't matter. The  
20 plaintiff's burden was satisfied by showing that kind of  
21 circumstantial evidence.

22                  And as I think Your Honor appreciates, we have  
23 their own documents, 17 different documents that talk  
24 about --

25                  **THE COURT:** But the commercial was for the car.

1 It wasn't for parts of the car. And it wasn't for, you  
2 know, luggage carriers that you can buy and put on the  
3 car, right, which would be much more like an IOL.

4 **MR. DAMLE:** Well, look, I think the important  
5 of the documents is that Alcon regards the LenSx  
6 respectively as a commercial.

7 **THE COURT:** Right. But, see, what I don't get  
8 is, then why didn't your expert start at 40 percent?  
9 Like, in other words, the only information your expert has  
10 at the starting point, as I can infer from the briefs, is  
11 the driving language coming out of the marketing  
12 department.

13 And it, as far as -- of course, I'm not really  
14 sure, but if I look at Page 3 of the brief, it's got those  
15 PowerPoint slide. And it says: "LenSx represents about  
16 \$90 million U.S. dollars in profit per year. LenSx  
17 accounts represent 40 percent of Alcon's PC IOL."

18 Is that the same thing as an IOL, PC IOL?

19 **MS. HEFFERNAN:** It is a type of IOL, yes.

20 **THE COURT:** Okay. And how much of the IOL,  
21 \$3.1 billion, is PC IOL?

22 **MR. DAMLE:** I think -- we think it's a -- I'm  
23 not 100 percent sure.

24 **THE COURT:** Okay.

25 **MR. DAMLE:** I think it's a majority.

1                   **MS. HEFFERNAN:** Because the advanced ^.

2                   **MR. DAMLE:** Right. The PC IOLs are the  
3 monofocal basic IOLs, the AT IOL.

4                   **THE COURT:** Right. What I don't get is --  
5 again, because you only give me limited information. I  
6 didn't read the reports, and I don't think that's my  
7 burden right now.

8                   I'm thinking, okay, you should get 40 percent,  
9 like the starting point. I mean, unless you've got  
10 another document which says there's some other  
11 correlation, you get 40 percent, especially given what has  
12 been confirmed for me today, which is that these are not  
13 inclusive supplier situations, and more importantly these  
14 are not situations where once a doctor starts using the  
15 LenSx, that's all they use. They don't do any other work  
16 besides the LenSx involving IOLs.

17                  **MR. DAMLE:** So I would point you to, there is a  
18 lot of different evidence with lots of different  
19 numbers --

20                  **THE COURT:** Okay.

21                  **MR. DAMLE:** -- showing this effect on IOLs.  
22 Now, what portion -- again, our burden, under the  
23 Volkswagen case, is to show that there is a reasonable  
24 relationship, not to identify with precision which IOLs  
25 were sold because of the infringement.

1                   **THE COURT:** I just don't find Volkswagen that  
2 compelling because it's not the same situation. The  
3 Volkswagen -- in the Volkswagen case, I mean, the Audi is  
4 the LenSx, right?

5                   **MR. DAMLE:** No. In the Volkswagen situation,  
6 the commercial is the LenSx. The commercial is what  
7 drives Audi sales, right. The commercial is what's  
8 infringing and the sales of the follow-on product, the  
9 convoyed sale, follows on from that.

10                  That's almost precisely the situation we have  
11 here.

12                  **THE COURT:** I guess, maybe I should -- to me --  
13 okay. Then the commercial is the source code that's used  
14 to operate the LenSx.

15                  **MR. DAMLE:** The -- in the commercial, there  
16 was -- the commercial wasn't entirely infringing. A part  
17 of the commercial was infringing, so.

18                  **THE COURT:** Yeah. I mean, it's not a really  
19 good analogy. I mean, the copyright in the Volkswagen  
20 case is the commercial?

21                  **MR. DAMLE:** Is a piece of the commercial. It's  
22 ten words of the commercial.

23                  **THE COURT:** Fair enough. Copyright here is --

24                  **MR. DAMLE:** Source code.

25                  **THE COURT:** -- some number of words in the

1 total computer code that operates the LenSx?

2                   **MR. DAMLE:** Correct.

3                   **THE COURT:** All right. And let's just posit  
4 that, that source code does indeed operate the LenSx.

5                   **MR. DAMLE:** Yes. It is necessary to run it,  
6 yes.

7                   **THE COURT:** Necessary to run it. See, again,  
8 that won't fit right with the commercial, because it's not  
9 necessarily for a commercial to run the Audi. But there's  
10 a correlation.

11                  Like, I think, for me, what I do find  
12 acceptable as an analogy is that the LenSx sales, what is  
13 sold directly as the direct infringement, is coming from  
14 the -- from the source code. It just doesn't fit very  
15 well, the more I think it through.

16                  I think that it's more attenuated here. Like I  
17 said, if you want -- the equivalent, it seems to me,  
18 perhaps, better in the context of the Volkswagen case,  
19 would be extras that you buy sometimes when you buy the  
20 Audi, but not always.

21                  **MR. DAMLE:** Well, maybe I can give you a  
22 different example, which is the Sunset Lamp case, which is  
23 discussed in the Audi case --

24                  **THE COURT:** Okay.

25                  **MR. DAMLE:** -- is a case where it was a

1 door-opener product, right. The company sold a  
2 door-opener product that was infringing. And they wanted  
3 to recover lost sales from that door-opener product, but  
4 also other products that are associated with that product.  
5 Not necessarily tied one to one, but are associated with  
6 the product.

7 And the Court said you are able -- that was a  
8 lost profits context. The Audi case talks about it in the  
9 disgorgement context, basically, to the same logic -- yes,  
10 because these two products tend to be sold together,  
11 right. A washer and dryer would be another example of  
12 that, right.

13 These two products tend to be sold together.  
14 You're able to get your lost profits, not just from the  
15 infringed product, but from the product that tends to be  
16 sold with it, right. And then the gross revenue is the  
17 full amount, would be the full amount of sales for that  
18 convoyed product. And then the burden shifts to them.

19 Now, they're able to -- they put forward, if  
20 they have -- if Ms. Davis has done so. We don't think  
21 they've done so, right. We don't think that Ms. Davis has  
22 done an apportionment. But it is their burden to do that.

23 And why the \$3.1 billion matters. Ms. Stamm's  
24 opinion is that, at least -- if you look at her response  
25 to Ms. Davis' analysis, this is to show, that doesn't show

1 no causation. It shows that at least \$772 million of  
2 revenue is caused by the infringement. And that would  
3 be --

4 **THE COURT:** But you've got -- this is where --  
5 look, where the fight is, is the definition of gross  
6 revenue.

7 **MR. DAMLE:** Right.

8 **THE COURT:** That's Number 1.

9 Number 2, do you agree gross revenue is  
10 established by showing a causal nexus?

11 **MR. DAMLE:** It's established by showing a  
12 reasonable relationship, right, which is done not through  
13 statistical causal proof, which is what they're claim is,  
14 and it's not shown by showing that each and every sale was  
15 caused by the infringement. That's contrary to  
16 Volkswagen. It's contrary to Third Circuit *Tally* case.

17 It's -- the kind of evidence that you have is  
18 often just circumstantial. It's the 17 documents.

19 **THE COURT:** Does it have to be, though,  
20 evidence of a causal nexus?

21 **MR. DAMLE:** It has to be evidence of -- the  
22 case uses the word "causal nexus," yes.

23 **THE COURT:** Right. I just wanted to check. It  
24 also uses "reasonably attributable."

25 **MR. DAMLE:** Correct.

1                   **THE COURT:** That's what I was focused on.

2                   **MR. DAMLE:** Right.

3                   **THE COURT:** But I'm going to go back and look  
4 at it. It sounds like, in discussing reasonable  
5 attributability -- whatever the correct noun would be -- it's  
6 got to be a causal nexus.

7                   **MR. DAMLE:** Yeah. And so I point you to the  
8 Ninth Circuit's articulation of the test in the *Polar Bear*  
9 case, which is a case that they cite, which is, that the  
10 requirement is to provide some evidence that the  
11 infringement at least partially caused the profits that  
12 the infringer generated.

13                  And I think there's no dispute here that IOL  
14 revenues were at least partially caused by the placement  
15 of a LenSx.

16                  **THE COURT:** Well, let me ask you this: Could  
17 you start with just the gross revenue for the company,  
18 period?

19                  **MR. DAMLE:** No.

20                  **THE COURT:** Why not?

21                  **MR. DAMLE:** Because that would include things  
22 like contact -- I happen to be wearing Alcon contact  
23 lenses. That would include contact lenses. It would  
24 include unrelated lines of business: Solution -- that's  
25 not -- that, I think, would be inappropriate. That's like

1 the Eighth Circuit --

2                   **THE COURT:** Well, wait. I mean, let's just  
3 assume for argument's sake the doctor's office also buy  
4 contact lenses from Alcon. So why don't we count them?

5                   **MR. DAMLE:** Well, I mean, if we had the  
6 evidence showing that causal relationship --

7                   **THE COURT:** So you do have to show some  
8 evidence?

9                   **MR. DAMLE:** We have to show some evidence that  
10 the infringement at least partially caused the category of  
11 profits that we're trying to seek.

12                  **THE COURT:** Okay. So what's your evidence that  
13 \$3.1 billion worth of sales is partially caused by LenSx  
14 sales?

15                  **MR. DAMLE:** It's all of the documents we've  
16 been discussing.

17                  **THE COURT:** See, those documents show, it seems  
18 to me, 40 percent of the 30.1 billion -- of the  
19 3.1 billion might be captured by that.

20                  **MR. DAMLE:** It's at least partially.

21                  **THE COURT:** So then, give me another figure.  
22 Why is it more than 40?

23                  **MR. DAMLE:** So if you look at -- in her  
24 report -- well, first of all, we have their own analysis,  
25 right, which we've used to get to the 772. That's a

1 partial -- at least partial.

2                   **THE COURT:** I think if you walked in and you  
3 said, "Look, I'm coming up with 772," I don't think you  
4 would have a fight on your hands. I mean, you would in  
5 front of the jury, but -- and they've already said they  
6 wouldn't have brought a *Daubert* motion.

7                   So you even agree, 772. How do you get above  
8 772? What's the causal evidence?

9                   **MR. DAMLE:** Again, this is all about the  
10 burden, right. So can show --

11                  **THE COURT:** No, no, no, no. Here's -- let's  
12 just assume right now you've got the burden. See, you've  
13 admitted at some level you have a burden. Because  
14 you've -- even you've admitted, you couldn't waltz in here  
15 and use gross revenue, period.

16                  **MR. DAMLE:** Correct. Correct.

17                  **THE COURT:** Right. Okay. So that means you've  
18 got to show something.

19                  **MR. DAMLE:** Right.

20                  **THE COURT:** All right. So, and frankly, if you  
21 came in here and you started at 40 percent of PC IOL  
22 business revenue, I think you'd have a really good  
23 argument. You know, you could say it would be a factual  
24 question, the experts can duke it out, and the jury will  
25 decide. I get that.

1                   **MR. DAMLE:** Right.

2                   **THE COURT:** And then whatever particular  
3 information you came up with to get the 772 figure, the  
4 same thing.

5                   So we've got to get, though -- you've got to  
6 get, from -- why you can posit more than 772, all right?

7                   So what do you have?

8                   **MR. DAMLE:** Again, I think this goes back to  
9 the burdens.

10                  **THE COURT:** Okay. So you're not going to  
11 answer the question. Because you'll lose if you're not  
12 going to answer the question.

13                  **MR. DAMLE:** So if we look at Ms. Stamm's  
14 report, it points to documents showing -- I don't know  
15 that. I have a number bigger than 40 percent in here.

16                  Well, let me -- if I may.

17                  **THE COURT:** Sure. Take a moment.

18                  **MR. DAMLE:** If I could just talk about one of  
19 the other cases, the *Polar Bear* case.

20                  **THE COURT:** Sure.

21                  **MR. DAMLE:** In the *Polar Bear* case, the  
22 plaintiff was seeking -- was starting -- their burden was  
23 to show gross revenues of sales of wristwatches, right.  
24 And they were seeking to provide evidence of the overall  
25 gross revenues made by the defendant at a trade show,

1 right.

2                   The trade show -- there was a trade show booth,  
3 the video was playing at the trade show booth.

4                   The plaintiff's expert testified that in his  
5 experience, 10 to 25 percent of the trade show sales are  
6 generated because of the excitement at the trade show  
7 booth, right. That was the evidence.

8                   But the plaintiff was not limited to presenting  
9 gross revenue of 25 percent of the overall trade show  
10 sales; they were able to put in the entire category, the  
11 entire gross revenue from trade show sales.

12                  Now, similar sort of situation here. Now, if  
13 they want to take that 40 percent and say, well, that  
14 shows that it's only 40 percent, that's really their  
15 burden. They can use that evidence to say that that's --  
16 that's their burden.

17                  Again, what the Court said -- in the Ninth  
18 Circuit said, was that you are able to put in gross  
19 revenue for the entire category of revenue for that  
20 product. That seems on all fours of what's happening  
21 here.

22                  **THE COURT:** Can you explain to me -- because,  
23 again, I've not read the report, right -- how does your  
24 expert get to 772?

25                  **MR. DAMLE:** Again, this is a response --

1                   **THE COURT:** I know, but just get me. If you  
2 were explaining in front of the jury, where do you start  
3 to get the 772?

4                   **MR. DAMLE:** Do you want to...

5                   **MR. MORIN:** May I -- Your Honor, may I?

6                   **THE COURT:** Sure.

7                   **MR. MORIN:** I think Mr. Damle is doing a  
8 fabulous job, but I know that portion of the report a  
9 little bit better, if that's helpful.

10                  **THE COURT:** All right. That's fine. Speak to  
11 the specific question.

12                  **MR. MORIN:** Sure. So in Ms. Stamm's opening  
13 report, she did what we viewed -- and I understand the  
14 Court may question that.

15                  **THE COURT:** She says 3.1.

16                  **MR. MORIN:** As the Volkswagen approach,  
17 basically.

18                  **THE COURT:** Right. Okay. Here's what I want  
19 to know is: Can she get to the 772 without starting at  
20 3.1?

21                  **MR. MORIN:** She does it, but it's still  
22 effectively a different way of saying what portion of the  
23 3.1 would be --

24                  **THE COURT:** Right. I just want to know: Does  
25 she get to it?

1                   In other words, what I'm -- just trying to be  
2 practical about this, is --

3                   **MR. MORIN:** Yes.

4                   **THE COURT:** -- that she's got some papers and  
5 she comes up and says, well, I started at 772.

6                   Let's just say, argument's sake only -- I've  
7 not made up my mind. Let's say, look, there's a rational  
8 basis, she could say 772 is a starting point.

9                   My question is -- and I'm going to ask them the  
10 same thing, is: Is it possible to even get to the 772  
11 without starting at 3.1?

12                  **MR. MORIN:** You can -- I don't mean to be  
13 confusing, Your Honor, and I apologize in advance. You  
14 can do math without taking three -- I think it's kind of  
15 interesting.

16                  Do you have just two minutes for me to explain  
17 how she got there? Because that's --

18                  **THE COURT:** That's exactly -- go ahead.

19                  **MR. MORIN:** Okay. So here's what's  
20 interesting. So our opening report -- not to beat a dead  
21 horse -- Stamm says, here's the category. And she viewed  
22 it as doing it like Volkswagen. And we instructed her.  
23 We thought that's how -- what Volkswagen required.

24                  **THE COURT:** Right.

25                  **MR. MORIN:** Now we said the burden's on them.

1                   The other side comes up -- and I don't know  
2 want to be overly simplistic. Their expert says, "I'm  
3 looking at accounts with the J&J product and the Alcon  
4 product." It's a nice control.

5                   I say, "How much Alcon IOLs do we sell?" And  
6 she puts together a chart. And she says, "There's only a  
7 4 percent difference, which isn't much." That's what she  
8 says.

9                   Now, Your Honor, it went from 10 percent to  
10 14 percent. And she says that's a 4 percent difference.

11                  Our point, when we went back and did the math  
12 is, if you took sales tax at 5 percent and went to  
13 10 percent, that's not a 5 percent difference, it's a  
14 doubling, right.

15                  So we made the point that that adds up, when  
16 you do all the math, to \$772 million. So what we said is,  
17 what she said didn't show much of anything. And what she  
18 said is negligible, is actually almost a billion dollars.  
19 It's \$772 million.

20                  Our point on the burden -- not to beat a dead  
21 horse -- was, we think we've discharged our burden at  
22 \$3.1 billion. And they haven't come back and done the  
23 apportionment. Our expert just used the numbers that she  
24 said showed lack of causation to show what percentage of  
25 the overall sales we found attributable to the IOLs.

1                   I would posture one thing, Your Honor, and may  
2 I just propose it because it may get to the end. We  
3 could, because the 772 -- I'll answer your -- and  
4 Mr. Damle was too, I think -- I'll answer your question  
5 very directly.

6                   We don't have a number between 772 and 3.1.  
7 And our expert will not say every single lens sale that  
8 was made to a LenSx account is because of that LenSx. We  
9 know that's not true. Some people do some manual things.

10                  We have viewed it as us meeting our burden, and  
11 them not meeting their burden. So our expert would come  
12 in and say it's at least 772. And the jury would be  
13 legally justified at giving something between the two  
14 numbers because they haven't discharged their burden.

15                  If it would solve the problem and offer  
16 Your Honor the right solution, we could agree that our  
17 expert will say nothing more than, it's at least 772, and  
18 not tell the jury it's -- \$3 billion is the correct  
19 number.

20                  But she should at least be able to present  
21 that, because like the Audi case and every other case --

22                  **THE COURT:** Present what?

23                  **MR. MORIN:** Say what the number is, not as the  
24 damages figure, but say, here is the circle of IOL sales.

25                  **THE COURT:** Which is 3.1.

1                   **THE WITNESS:** Which is 3.1. And in the pie  
2 chart say -- to make it very clear to the jury, she's not  
3 reaching for all of them -- it's at least the 772.

4                   And our friends on the other side say, well,  
5 you're just trying to get big numbers in front of the  
6 jury. But if not, we're not explaining that we're  
7 actually apportioning or we're taking a subset of it.

8                   So if it would solve Your Honor's issue, I  
9 think what we could agree is the following: She will not  
10 advocate the damages are \$3.1 billion, and we won't play  
11 the burden game. She will say, it's at least 772 -- using  
12 the other side's numbers -- but she has to be able to  
13 explain the pie chart, not as a "I could seek all of  
14 this," but explaining what's going on, that it's only a  
15 quarter of the sales to those IOLs, which is a factually  
16 true statement, so they can understand that we're not  
17 overreaching, if you will, and doing the burden game.

18                   I think that would solve the problem.

19                   **THE COURT:** Then, I mean, 772 is almost --  
20 well, no. It's actually a lot less than 40 percent.

21                   **MR. MORIN:** The 40 percent -- so there are  
22 numbers that talk about a 40-percent difference. I  
23 suppose we could have gone in and tried to -- it's their  
24 burden, we believe. But we could have gone in and said,  
25 use that 40 percent.

1                   What we decided to use was, not the documents  
2 that talked about a generalization of those accounts, but  
3 the specific. We have customer-by-customer data, which is  
4 what I'm talking about, with -- accounts with LenSx versus  
5 accounts with Catalys, with J&J, and we use those actual  
6 numbers to come up with our numbers, which is a lot less  
7 than 40 percent. It's 25 percent or 27 percent.

8                   But the underlying point to this, I am offering  
9 a compromise. You seem not to be buying our argument,  
10 which we believe in, but we respectfully --

11                  **THE COURT:** Well, I don't know. I mean, I --  
12 look, here's -- what I'm struggling with is this. I think  
13 that -- it's what you encounter all the time in this these  
14 cases, right. Everybody's kind of overshooting.

15                  And so I think that because gross revenue is  
16 undefined, it can be hard to parse when you actually apply  
17 it. And so -- and I think, you know -- who was the  
18 gentleman who spoke?

19                  **MR. MORIN:** Oh, Mr. Damle.

20                  **THE COURT:** Yeah, Damle. He did what he had to  
21 do, which he had to admit -- like, I would have never  
22 believed anything else he said in argument if he said, oh,  
23 no, no, we can start with the gross revenue of the  
24 company, right, or even the gross revenue of everything  
25 sold to the practices that have a LenSx account, right.

1 Like contact lenses, right.

2                 But, you know, there's -- and then I think, the  
3 other side would have to -- they would have no credibility  
4 if they say, well, let's not count the LenSx sales, right.  
5 And the answer is, well -- but the hard part is, well,  
6 what's in between.

7                 **MR. MORIN:** Right.

8                 **THE COURT:** And we know we have to use IOLs  
9 with LenSx. Now, they don't have to be Alcon's IOLs, but  
10 some IOLs have to be used with LenSx. And I don't know if  
11 there's any other piece of equipment out there that has to  
12 be used with the surgery, but definitely IOLs.

13                 I can see the other products that Alcon might  
14 be selling that would be associated with, maybe eyedrops  
15 that somebody uses after they get the surgery. I'm just  
16 making it up. I don't know. Right.

17                 It's where do you find this gross revenue?  
18 Where do you draw the line? And it's not that clear.  
19 It's a hard question, right.

20                 And that initially -- but you, it seems to me,  
21 have to prove -- you have to put something forward. You  
22 couldn't just posit all contact lenses, right. You'd have  
23 to -- unless you can show a connection. So the only  
24 connection you've shown is that IOLs are used in the  
25 surgery. That's it.

1                   **MR. MORIN:** No. Well, I think in terms of --  
2 not to beat a dead horse, but we have all the documents,  
3 you pointed to, that it drives it. I mean, we have  
4 evidence there's a connection.

5                   **THE COURT:** Oh, oh, sure. I apologize. You  
6 definitely have those, but --

7                   **MR. MORIN:** We have evidence there's --

8                   **THE COURT:** -- they're all about IOLs.

9                   **MR. MORIN:** Right. That's right.

10                  And so where I would leave you -- I think it's  
11 been a robust discussion. I'll answer any of your  
12 questions. I mean, I think the first -- it is an  
13 interesting academic question.

14                  I actually think the statute is interesting,  
15 and how VW answered it and how the Third Circuit and the  
16 other cases have answered it, are interesting. And you  
17 could see academic debate on it. Here's why.

18                  We seem to have a disagreement on what that  
19 nexus has to be to. Does it have to be that you show the  
20 subset of IOL sales, that actually were attributable, were  
21 the extra sales as a result of LenSx in Step 1, where we  
22 identify the gross revenues, or is it enough to do the  
23 category.

24                  And respectfully, Your Honor, I know you see  
25 the Audi case is different in the sense that -- I mean,

1 it's a very complicated -- you know, putting all these  
2 together -- but in the sense that this is the convoyed  
3 thing, and the advertisement was about the TT rather than  
4 about an accessory to the TT.

5                 But one thing I think that dispositively tells  
6 us is, whatever the causal nexus needs to be, it doesn't  
7 have to be onsie-twosie, and it doesn't have to carve up  
8 that category. They say, you bring in the whole category  
9 and then it shifts to the other side.

10               So the causal nexus does not have to be,  
11 whether it's 100 percent or 80 percent or 60 percent of  
12 whatever you're dealing with. The courts make that very  
13 clear.

14               The 772, if you will, gets to what you would do  
15 to parse it up in Level 2. But the point is, they never  
16 did that on the burden shifting. We came back did that  
17 with the data that they gave us afterwards.

18               Whatever the case, we think the proper approach  
19 is -- what we were planning to do, is to say, it's at  
20 least 772. And they haven't met their burden, so it could  
21 be up to \$3.1 billion.

22               If Your Honor is less comfortable with that in  
23 viewing all the case law, I am offering the compromise  
24 that we will say, "Here is the overall category." We have  
25 to be able to quantify it to explain the context of what

1 we've done.

2 And that when we come and they say we're being  
3 unreasonable, we could say, "It's only a quarter of these  
4 sales that we're asking for damages on, and our witness  
5 just say it's at least 772."

6 But the point is, she would not then put out  
7 the number and say, "Jury, I believe it's \$3.1 billion."

8 **THE COURT:** Okay. Thank you.

9 **MS. HEFFERNAN:** Okay. So I'm going to do my  
10 best to kind of pick my way through the questions you  
11 asked my colleagues.

12 I do have Ms. Stamm's schedule from her  
13 report -- I can hand it up to Your Honor -- where she  
14 calculates the \$772 million.

15 She does not start with \$3.1 billion; instead,  
16 she starts with, as I mentioned earlier, this difference  
17 in penetration of IOLs into accounts that have an Alcon  
18 phaco and Alcon LenSx, versus accounts that have an Alcon  
19 phaco and Catalys, J&J Catalys.

20 May I hand it up? Just so can you see there's  
21 no \$3.1 billion.

22 **THE COURT:** Right. But let's just start,  
23 though -- let's start with the proposal on the table,  
24 which is, they don't mention 3.1, and they say starting  
25 point, you know -- it's 772, up to -- I guess they would

1 mention 3.1 because they want to put what the cap would  
2 be.

3 **MS. HEFFERNAN:** So that wouldn't be acceptable  
4 to us.

5 **THE COURT:** Yeah. You know, here's the thing:  
6 If she had started with 40 percent of 3.1 --

7 **MS. HEFFERNAN:** May I correct Your Honor on  
8 that?

9 **THE COURT:** Yeah.

10 **MS. HEFFERNAN:** It's not 40 percent on the 3.1.  
11 The document that Your Honor's referring to talks about  
12 40 percent of PC IOLs --

13 **THE COURT:** Right.

14 **MS. HEFFERNAN:** -- presbyopia-correcting IOLs.

15 **THE COURT:** Right. Which is funny. I actually  
16 Googled it to figure out what the heck it is, and I guess,  
17 you know, it's not record evidence, but I assume it's a  
18 subset of IOLs.

19 **MS. HEFFERNAN:** It is a subset of IOLs.

20 **THE COURT:** Right.

21 **MS. HEFFERNAN:** But that would be only  
22 40 percent of those PC IOLs that are sold into a LenSx  
23 account, which is not \$3.1 billion.

24 **THE COURT:** Right.

25 **MS. HEFFERNAN:** And then they -- but they don't

1 just seek infringing indirect profits on PC IOLs. They  
2 seek them on all advanced technology IOLs and all  
3 monofocal IOLs.

4 So it's not 40 percent of 3.1 billion.

5 40 percent in that document is 40 percent of PC IOLs that  
6 are sold into a LenSx account.

7 **THE COURT:** Okay.

8 **MS. HEFFERNAN:** So you can't -- one cannot  
9 apply 40 percent to 3.1 billion.

10 **THE COURT:** All right. There's also, though,  
11 in the bottom left of the same PowerPoint slide,  
12 there's -- it says, "22 percent of LenSx accounts,  
13 percentage of Alcon IOL." It's not limited to PC IOLs.

14 So 22 percent, which is not that far off from  
15 772 million. Right. 772 million is going to be, I don't  
16 know, a little bit under 25 percent, right?

17 **MS. HEFFERNAN:** I think that's fair. But I'm  
18 not sure what the question is.

19 **THE COURT:** Let's just suppose that's what they  
20 started with. Let's suppose -- let's suppose they had  
21 their expert take the approach that LenSx -- Alcon's own  
22 internal documents acknowledge 22 percent correlation, or  
23 actually -- and in fairness for them, I think that would  
24 be, in my mind, sufficient to put in front of a jury as  
25 causation -- but 22 percent of all Alcon IOL sales go to

1 LenSx accounts.

2                   **MS. HEFFERNAN:** So what their expert did was  
3 look at the document Your Honor's looking at, did not use  
4 that number, used a different number from that document,  
5 to get to her \$511 million.

6                   **THE COURT:** Okay.

7                   **MS. HEFFERNAN:** We did not move on that number.

8                   **THE COURT:** Right.

9                   **MS. HEFFERNAN:** Yeah.

10                  **THE COURT:** Hold on. I'm just asking though,  
11 what if she had said, "My starting point is 22 percent of  
12 the \$3.1 billion"?

13                  **MS. HEFFERNAN:** I haven't done the analysis for  
14 that, and whether we would, at that point, have brought a  
15 different *Daubert* motion before the Court. I haven't done  
16 the analysis, and our expert hasn't done it, and neither  
17 has theirs. So I know that's dissatisfying, but I'm not  
18 sure I can answer that question.

19                  But may I add, though, Your Honor, you asked a  
20 question about -- you know, this is, in some sense, a line  
21 drawing exercise; where do we draw the line?

22                  **THE COURT:** Right.

23                  **MS. HEFFERNAN:** Well, we draw the line -- they  
24 have drawn the line, beyond LenSx, to also include the  
25 soft-fit patient interface which does have a one-to-one

1 correlation with LenSx devices. You cannot use a  
2 patient --

3 **THE COURT:** Hold on.

4 You didn't move to exclude anything about soft  
5 fits.

6 **MS. HEFFERNAN:** Correct. And what I'm doing  
7 is, I'm letting Your Honor know what's in play. You  
8 asked.

9 **THE COURT:** Oh.

10 **MS. HEFFERNAN:** This is a line-drawing  
11 exercise, and I'm letting the Court know, a little bit,  
12 where those lines have been drawn.

13 So they are seeking profits on placements of  
14 LenSx devices. They are seeking indirect profits on every  
15 patient interface used with a LenSx whenever it's run.  
16 That is not the subject of our *Daubert* motion.

17 They are also seeking indirect profits on all  
18 of the service revenue from servicing LenSx devices. That  
19 is not the subject of our motion.

20 Finally, they are also seeking indirect profits  
21 on sales of Verion digital marking machines which help to  
22 implant IOLs after a LenSx is used. We are not seeking to  
23 exclude that.

24 So as far as line-drawing exercises go, there  
25 is a big line that's been drawn around all of that

1 equipment. That is not the subject of our *Daubert*. The  
2 only subject of our *Daubert* is the IOLs.

3 And more specifically, this jump from 511, or  
4 alternatively, 772, which Ms. Stamm has some evidence  
5 for -- we disagree with it, but she has some evidence for  
6 it -- jumping from that to the 3.1 billion that she has  
7 absolutely no evidence of a causal nexus for.

8 And the case law is clear, that you need to  
9 have a causal nexus. You look at *Leonard v. Stemtech*,  
10 which is a Third Circuit case. And --

11 **THE COURT:** I'm okay with the causal nexus.  
12 They don't dispute it, so...

13 **MS. HEFFERNAN:** Okay. And then also the PP --  
14 the *Polar Bear*, sorry -- the *Polar Bear* case, which I  
15 think is a Ninth Circuit case --

16 **THE COURT:** It is.

17 **MS. HEFFERNAN:** -- in that case, the Court said  
18 it was okay for them to go after indirect profits based on  
19 sales that were made at the trade show, where it was  
20 undisputed that customers at the trade show saw the  
21 commercial and it participated in their purchasing  
22 decision.

23 But then they, "they" the plaintiff, went after  
24 more than that, and said, Okay. Well, we have had a lot  
25 of success with this advertising campaign. We think it

1 has an effect, actually, on retail sales outside of the  
2 trade show context. Let's go after retail sales.

3 And *Polar Bear* Court said, "There must be a  
4 demonstration that the infringing acts had an effect on  
5 profits before the parties can wrangle about  
6 apportionment."

7 So you've got to do causal nexus before you get  
8 to apportionment.

9 "To recover indirect profits under its theory,  
10 brand premium theory, *Polar Bear* shoulders the burden of  
11 demonstrating that the infringement is causally linked to  
12 the revenues from the sales of all expedition watches."

13 So they need to show a connection to all IOLs  
14 if they want to try to get indirect profits on them. Not  
15 just a category or an idea, but they have to show a causal  
16 nexus to all.

17 And, in fact, I think it was -- I think it was  
18 the *Polar Bear* case that went on to say, "The whole point  
19 of the causation element of the statute serves as a  
20 logical parameter to the range of gross profits. This  
21 rule of reason obviates a great deal" -- sorry -- "a good  
22 deal of mischief in claiming profits beyond what might be  
23 attributable to the infringement."

24 And that is the *Polar Bear* case at 711.

25 And that's exactly what we have here. From

1       772 million, up to 3.1 billion, that's the mischief. They  
2 have shown a nexus of some kind, a correlation to 511 and  
3 772, but absolutely nothing beyond that.

4                   **THE COURT:** Do you know, was 504(b) in  
5 existence before source code was deemed to be  
6 copyrightable?

7                   **MS. HEFFERNAN:** I do not, standing here, know  
8 the answer to that question.

9                   **THE COURT:** I mean, I'm going to guess it was,  
10 but do you know?

11                  **MS. HEFFERNAN:** I would assume it was. But I  
12 can't answer that question that I know it was.

13                  **MR. MORIN:** Sy's not --

14                  **MR. DAMLE:** Huh-huh. Yeah.

15                  **MS. HEFFERNAN:** Oh, Sy, I forgot you're in the  
16 room.

17                  **MR. DAMLE:** Yes. The answer is yes. It was  
18 copyrighted before.

19                  **THE COURT:** Long before. I'm going to guess  
20 it's been a -- probably the common law, or -- but it's  
21 certainly, it's been --

22                  **MR. DAMLE:** Well, computer programs were  
23 recognized as copyrightable before 1976, which is when  
24 this provision was adopted.

25                  **THE COURT:** Oh, so wait. You're saying this

1 provision did not predate source code --

2 **MR. DAMLE:** No. This provision postdated that.

3 **THE COURT:** Postdated. I didn't hear you  
4 correctly.

5 **MR. DAMLE:** Sorry. The provision was adopted  
6 after the recognition of computer programs as being  
7 copyrightable.

8 **THE COURT:** In the statute? Okay.

9 **MR. DAMLE:** It was common -- it was under the  
10 1909 Act, which didn't use the word "computer program."  
11 But it was understood that computer programs in case law,  
12 was understood that computer programs were protectable  
13 under copyright law prior to 1976. This provision was  
14 adopted by its terms in 1976.

15 **THE COURT:** All right. Anything else?

16 **MS. HEFFERNAN:** Only if Your Honor still has  
17 questions.

18 **THE COURT:** Well, I have lots of questions. I  
19 think a -- it's not clearcut. And that's why I was trying  
20 to come up with something practical.

21 **MS. HEFFERNAN:** Thank you, Your Honor.

22 **THE COURT:** But I'll just think more about it.  
23 It's still not clear to me what the right answer is. I  
24 don't have a very strong conviction about gross revenue,  
25 how it's defined.

1                   So I'll think more about it. All right?

2                   Thanks.

3                   **MS. HEFFERNAN:** Thank you.

4                   **THE COURT:** I don't know if it's worth doing  
5                   the second motion. I mean, I've got a sentencing at 2:30,  
6                   or rather, a plea hearing. I guess we could -- and I  
7                   thought that the -- basically, how I decided the first  
8                   motion would influence the second.

9                   Am I wrong on that?

10                  **MR. MORIN:** Your Honor, I don't think that  
11                  whatever you decide in the first one would affect the  
12                  second. IOLs are in play.

13                  **THE COURT:** All right. Well, then walk me  
14                  through them. Whoever's going to argue, let's go.

15                  **MR. MORIN:** My colleague, Ms. Blitzer, I think  
16                  it's the first time before this Court.

17                  **THE COURT:** All right. Thank you.

18                  **MS. BLITZER:** Good afternoon, Your Honor.  
19                  Rachael Blitzer for plaintiff.

20                  I have brought some slides today to help -- to  
21                  aid with my discussion. And I'll try to keep this brief.

22                  The reason for J&J's *Daubert*, Number 3, is  
23                  Ms. Davis' attempt to opine on hundreds of millions of  
24                  dollars in IOL expenses through a single sentence in a  
25                  footnote. And that single sentence adopts a single

1 forecast in a company's presentation. And she uses this  
2 presentation and that one line to try to deduct off of the  
3 top of Alcon's IOL revenue, 62 percent of all expenses  
4 across the board for a period of about 12 years.

5 We've listed, in our papers, a number of  
6 reasons why this is inappropriate and why this should be  
7 excluded under *Daubert*. I'll quickly talk through a  
8 couple of them.

9 The first is, this is contrary to copyright  
10 law. And the second is, that this is unreliable and  
11 untestable and that can't be cured here by  
12 cross-examination.

13 So talking quickly about the law. The law  
14 requires, here, that a defendant identify its costs that  
15 are deductible when a plaintiff is seeking profits.

16 You read Section 504(b) earlier.

17 And the cases make very clear that only those  
18 expenses that are proven with some specificity to relate  
19 to the infringement are deductible. And a defendant can't  
20 meet this burden by providing general statements of broad  
21 categories of expense. They really have to identify each  
22 item that they intend to deduct.

23 It's a very exacting standard, and it's one  
24 that Ms. Davis completely fails to meet.

25 She needs to identify all of the different

1 expenses that she seeks to deduct on an individual level.  
2 So the costs to make the IOLs, the cost to market them, to  
3 ship them, and a host of others. But, instead, her entire  
4 analysis is contained here in the footnote that you see on  
5 the screen, where she performs no actual analysis, but  
6 just adopts a profit margin number from an Alcon capital  
7 allocation.

8 Now, for comparison sake, let me compare that  
9 to the analysis that Ms. Davis did in her work to deduct  
10 costs for LenSx, also at issue in the case.

11 When doing that, she spoke about it in her  
12 report over the course of four different pages, and she  
13 included five different schedules listing out all of the  
14 different expenses that she thought were appropriate to  
15 deduct. They're all there line by line. This includes  
16 citations to over a dozen different Alcon financial  
17 documents, like spreadsheets and conversations with Alcon  
18 personnel.

19 This is the analysis done for LenSx, as  
20 compared to the single footnote that I showed you earlier.  
21 And I don't even think I'm quite at the end of it, but I  
22 will keep moving ahead.

23 In addition to not meeting the standards for  
24 proving deductions under the Copyright Act, the cross-exam  
25 is also insufficient to address the reliability problems

1 with this analysis. That's because Alcon and Ms. Davis  
2 have not provided any of the documents that underlie the  
3 38-percent figure. That data has not been provided.

4 Now, Alcon is a publicly traded company. They  
5 make -- they have a multibillion dollars IOL business.

6 I don't know why this single document is the  
7 one that they've provided to their expert, but surely they  
8 have troves and troves of financial information  
9 documenting the expenses that go into their IOL business.

10 So here we have the 38-percent figure that  
11 Ms. Davis relies on. And I don't know if that 38-percent  
12 figure, if it's based on something or if it's based on  
13 nothing. But either way, Alcon has a big problem on their  
14 hands. Because if that 38-percent figure is based on  
15 something, if it's based on real, hard data, then there  
16 where is that data? Why has that data not been produced  
17 in this case? What does that data show? What expenses  
18 are included in that data?

19 We have no idea. Even Ms. Davis has no idea.  
20 She asked Alcon for that information and they didn't give  
21 it to her.

22 Now, if that 38-percent number, on the other  
23 hand, is not based on data, well, of course, that's  
24 inherently a huge problem in itself. That it is  
25 completely unreliable. But either way, Alcon cannot meet

1 its burden simply with this number. And because we don't  
2 have the information that backs up that number, we can't  
3 meaningfully cross Ms. Davis on it.

4 So if Ms. Davis were to come into court and  
5 opine ipse dixit that 62 percent of the Alcon's IOL  
6 revenue is deductible, we have no way to cross that. We  
7 have no way to prove that she's wrong, because we have no  
8 seen the documents underlying it. And even she has not  
9 seen the documents underlying it.

10 Now, this is exactly that *Daubert* was intended  
11 to prevent.

12 In the interest of time, I'll wrap it up. But  
13 I will just note that, in addition to not being sufficient  
14 under the copyright law, this document is unreliable on  
15 its face. It's identified as preliminary. There is  
16 language earlier in the report indicating that this report  
17 is not to be used for financial reporting. And moreover,  
18 it's a forecast. This doesn't even purport to be an  
19 actual profit margin.

20 Now, Alcon has made the case that there's  
21 another document out there that they can use to  
22 substantiate this number. That's something that we  
23 learned for the first time in Ms. Davis' deposition. That  
24 was not included in her report. I showed you the entirety  
25 of her position on my first slide.

1                   But regardless, I want to make very clear, that  
2 that other document that's supposedly referenced, that  
3 document does not substantiate a 38-percent profit margin.  
4 That document shows much higher profit margins, which  
5 means much smaller deductions.

6                   All that document is used for is to say, okay,  
7 well, for the costs considered in that document, those  
8 cost remain steady over time. So therefore, we can say  
9 that the much bigger costs, addressed in this 38-percent  
10 document, remain steady over time. But that doesn't make  
11 any sense. There are many more costs, obviously, included  
12 in this 38-percent figure. That spreadsheet cannot speak  
13 to whether these remain constant.

14                  And I want to leave you with one last thought  
15 on our inability to properly cross-examine here.

16                  I walked you earlier through Ms. Davis'  
17 deduction of specific expenses, which is required under  
18 the law. And going through the expenses, she deducts  
19 many -- and then there are also expenses on Alcon's books  
20 that she says, "These are inappropriate. These are not  
21 attributable to LenSx. I'm not going to include them in  
22 my analysis."

23                  Now, because we were able to identify all of  
24 the expenses that she did opt to include, we had our own  
25 expert opine on them as well. And she pointed out that

1 some of those were inappropriate deductions, and that,  
2 therefore, they should not have been included in Stamm's  
3 deductions.

4 We then had an opportunity to depose -- I'm  
5 sorry, in Davis' deposition -- we, then, had an  
6 opportunity to depose Ms. Davis on that question and say,  
7 "Is it true that these were inappropriate deductions?"

8 And she said, "Yes. You're right. These were  
9 inappropriate deductions. I will remove them from my  
10 calculations when I update them before trial."

11 But we don't have the opportunity to do that  
12 with this 38-percent figure. It just stands out there on  
13 its own with no support, no analysis, and Ms. Davis  
14 reports to use it to deduct hundreds of millions of  
15 dollars.

16 **THE COURT:** What's the theory then? Why  
17 doesn't it comport -- it's a Rule 702 motion, right?

18 **MS. BLITZER:** Yes.

19 **THE COURT:** All right. So what is it that  
20 violates 702?

21 **MR. DAMLE:** Well, completely unreliable.

22 **THE COURT:** Is there anything else?

23 **MS. BLITZER:** No. You know, in their papers  
24 Alcon has argued that it need only meet the fit  
25 requirement, that it need only be something that's helpful

1 to the jury. That's not the only element under 702 in  
2 *Daubert*. There's also the requirement of qualification,  
3 and most importantly, the requirement of reliability.

4 And this is not only unreliable, but it's not  
5 amenable to cross-examination. We can't fix this on cross  
6 because we haven't seen the documents and Ms. Davis  
7 hasn't seen the document.

8 **THE COURT:** Okay. So it's reliability -- lack  
9 of reliability?

10 **MS. BLITZER:** Yes.

11 **THE COURT:** All right. Thanks very much.

12 **MS. BLITZER:** And contrary to law.

13 **THE COURT:** I don't think the rule says  
14 anything about contrary to law, does it? I think that's  
15 reliability.

16 **MS. BLITZER:** Well, under 702, definitely  
17 reliability.

18 **THE COURT:** Okay. Thank you.

19 **MS. HEFFERNAN:** The case law says nothing about  
20 the type of documents an expert can use to prove  
21 deductions. And there's the *Counselfnet* case that we  
22 cite --

23 **THE COURT:** You know, I've got to -- look, I  
24 will be -- honestly, I didn't read the papers.

25 **MS. HEFFERNAN:** Okay.

1                   **THE COURT:** Just so you'll know because of the  
2 rush we're in, I studied at length the first *Daubert*  
3 motion, saw that the -- I asked for oral argument.

4                   If you look at my oral order, what it says is,  
5 you should also be prepared. And the reason why I said  
6 that was because the other motion had to do with IOLs, and  
7 so I assumed some causal connection. That's -- to be  
8 upfront, that's what I did.

9                   **MS. HEFFERNAN:** There's some correlation, but  
10 no causal --

11                  **THE COURT:** You needed -- you needed to be  
12 prepared, and you all were and did very nice arguments.  
13 And that was a very nice argument, especially given it's  
14 your first.

15                  So, just to be candid, so but it's worthwhile.  
16 It helps me. And I've got another seven minutes before I  
17 go into another proceeding.

18                  So, you know, I mean, I can say it was pretty  
19 good argument, and it's going to certainly make me go back  
20 and read this motion carefully. I mean, I've got some  
21 concerns.

22                  These are predictive data?

23                  **MS. HEFFERNAN:** Well, it's -- this is -- yes,  
24 this predicts the deductions for IOLs in 2021, but based  
25 on evidence from 2018, 2019 that formed the basis of this

1 document.

2                   **THE COURT:** Okay. Were there documents that  
3 were produced that address those prior years?

4                   **MS. HEFFERNAN:** So those documents -- they did  
5 not ask for those documents. Can I just let the Court  
6 know how this kind of bubbled up during the course of  
7 discovery?

8                   **THE COURT:** Sure.

9                   **MS. HEFFERNAN:** So on February 14, 2022, just  
10 two weeks before the close of extended fact discovery, was  
11 the first time J&J told Alcon it was going to go after  
12 disgorging IOLs. It's the first time we learned of it.  
13 So we scrambled and got documents for -- as best we could,  
14 for Ms. Davis in terms of IOLs and deductible expenses.

15                  As I mentioned during our first argument,  
16 neither company tracks expenses on a product level. So  
17 not on an IOL level. So we went to Alcon Finance and  
18 said, "Do you have anything to show expenses for IOLs?"

19                  And they said, "We did a one-off deep dive with  
20 McKinsey & Company," which is a consulting company, "and  
21 they prepared this presentation," which is at -- let's  
22 see. I think it's Exhibit 40. I'll get it up.

23                  But in any event, the presentation was prepared  
24 in conjunction with McKinsey & Company --

25                  **THE COURT:** Is that part of the presentation?

1                   **MS. HEFFERNAN:** It is. It is part of it.

2                   **THE COURT:** Okay. "This," so the record  
3 reflects, is the slide that's on the screen which appears  
4 to the J&J Exhibit 22-A at Page 8.

5                   **MS. HEFFERNAN:** That's right.

6                   And in the Alcon responsive brief, we actually  
7 have the entire presentation. And that is at -- I'm  
8 sorry, Exhibit 48 to Alcon's responsive brief.

9                   And the cover page shows that it is a capital  
10 allocation presentation. And then below that it says "ECA  
11 Discussion Document." That's the executive committee of  
12 Alcon. It's made of the top six or seven folks of Alcon:  
13 The chief executive officer, the chief financial officer,  
14 et cetera.

15                  This document was prepared for that committee  
16 to decide -- after the spin of Novartis, Alcon was spun  
17 off from Novartis in 2019 -- based on Alcon's prior  
18 financial performance, how are we going to allocate our  
19 capital going forward to get the highest return on  
20 invested capital?

21                  And so they looked at -- "they," meaning  
22 McKinsey and the financial folks at Alcon -- looked at  
23 past performance. Here's what we invested in the past.  
24 How did it do? What was our return? Do we want to  
25 continue investigating internally? Do we want to start

1 acquiring external companies the pharma business because  
2 there's a higher return on invested capital there?

3 That's what this entire presentation, in  
4 Exhibit 40 to Alcon's answering brief, discusses. And it  
5 is one of most reliable presentations because Alcon's top  
6 executives are making business -- forward-looking business  
7 decisions based on past historical financial performance  
8 on how to investigate their capital.

9 Ms. Davis had a conversation with  
10 Andrew McDonald -- she testified to it at her  
11 deposition -- about this document and what went into  
12 making up this document and believed, based on her expert  
13 experience, totally reliable to use this.

14 **THE COURT:** And who's Andrew McDonald again?

15 **MS. HEFFERNAN:** He is part of the finance team  
16 at Alcon.

17 **THE COURT:** All right. Anything else?

18 **MS. HEFFERNAN:** Just briefly.

19 So I heard a pretty good cross-exam of  
20 Ms. Davis in the argument just now. But the questioning  
21 of Ms. Davis on this document at her deposition was maybe  
22 two and a half pages of questions.

23 So they had their opportunity to get additional  
24 information about this document and its reliability from  
25 Ms. Davis at her deposition and decided not to.

1                   Now, if the -- anybody wants -- you know,  
2 we'll -- we can bring a witness who can testify more about  
3 it at trial, but Ms. Davis had these conversations and  
4 absolutely trusts in the reliability of this presentation.  
5 She used a second document that was referred to during the  
6 argument to corroborate the evidence in this document.

7                   That second document is one that is produced --  
8 prepared every single year of Alcon's existence from --  
9 prior to 2010, and it's going to go for a long time  
10 because it's required to be prepared by the Swiss and U.S.  
11 tax authorities.

12                  Alcon has Swiss connections. There's Swiss  
13 tax. They want their tax dollars; the U.S. wants its tax  
14 dollars. And so there is an allegation of revenue that is  
15 performed each and every year, because that is subject to  
16 an audit by the Swiss and U.S. tax authorities.

17                  Ms. Davis had a conversation with  
18 David Chamberlain, who is in the tax department at Alcon,  
19 about that corroborating document and felt that document  
20 was sufficiently reliable for her to corroborate this  
21 number -- this number, the 38 percent that we see on the  
22 slide here -- because it includes also some more  
23 deductible expenses beyond what was in the Chamberlain  
24 document; namely, R&D.

25                  And so Ms. Davis felt that this 38-percent

1 number was more inclusive of all of Alcon's deductible  
2 expenses for IOLs and that's why she used it.

3 **THE COURT:** All right. So this is the only  
4 document she relied on, the Exhibit 22-A here, right?

5 **MS. HEFFERNAN:** Well --

6 **THE COURT:** Except for, she then corroborated,  
7 I guess, you're saying, with this Chamberlain document.

8 **MS. HEFFERNAN:** I would just make a slight  
9 correction to that --

10 **THE COURT:** Yeah.

11 **MS. HEFFERNAN:** -- and say it's the document at  
12 Exhibit 48 to Alcon's answering brief, because that's the  
13 full document. This is just an excerpt.

14 **THE COURT:** Fair enough. Okay.

15 **MS. HEFFERNAN:** But, yes. So she relies on  
16 this document --

17 **THE COURT:** This document we're going to call  
18 the McKinsey presentation?

19 **MS. HEFFERNAN:** Yes.

20 **THE COURT:** Okay. And then the other document  
21 is --

22 **MS. HEFFERNAN:** Let's call it the --

23 **THE COURT:** The Chamberlain document.

24 **MS. HEFFERNAN:** The Chamberlain document.

25 **THE COURT:** Okay. Were the Chamberlain

1 document and the McKinsey presentation produced in  
2 discovery?

3 **MS. HEFFERNAN:** Yes.

4 **THE COURT:** Okay. Were they produced prior to  
5 her giving this opinion?

6 **MS. HEFFERNAN:** They were -- yes, they were  
7 produced prior to her giving the opinion. The document  
8 that we're -- the McKinsey document was produced prior to  
9 the close of fact discovery.

10 And the Chamberlain document was produced just  
11 prior to Ms. Davis serving her rebuttal report in which  
12 she addressed Ms. Stamm's IOL disgorgement analysis,  
13 because that was the first time Alcon knew they were going  
14 to be going after IOLs.

15 **THE COURT:** That's the Chamberlain document?

16 **MS. HEFFERNAN:** That's correct.

17 **THE COURT:** So McKinsey was produced before the  
18 end of fact discovery?

19 **MS. HEFFERNAN:** Yes.

20 **THE COURT:** Chamberlain document was produced  
21 somewhere between the responsive expert brief from Stamm  
22 and reply brief by Davis.

23 **MS. HEFFERNAN:** Between Stamm's opening brief  
24 and Davis' rebuttal brief.

25 **THE COURT:** Okay. All right.

1                   **MS. BLITZER:** Your Honor, if I can just  
2 correct --

3                   **MS. HEFFERNAN:** Or rebuttal report, I should  
4 say.

5                   **MS. BLITZER:** Yeah, that document was provided  
6 at the exact same time as the rebuttal report.

7                   **MS. HEFFERNAN:** Yeah, it was -- I think it was  
8 the day of, the day before of, but it was produced with  
9 her rebuttal report. I wasn't trying to take liberties  
10 there. I think I said that it produce...

11                  **THE COURT:** You said "before," which is a  
12 little different than "with."

13                  **MS. HEFFERNAN:** Well, I don't know if it was  
14 hours before or what, but it was produced, I'll say, in  
15 conjunction with her rebuttal report.

16                  **THE COURT:** Well, that sounds more accurate.  
17 Okay.

18                  **MS. HEFFERNAN:** And then, also, the  
19 conversations that she had with Mr. McDonald and  
20 Mr. Chamberlain.

21                  **THE COURT:** Right. Okay.

22                  So the first you ever hear of the 38 percent is  
23 in the rebuttal report?

24                  **MS. BLITZER:** No. The first that we ever hear  
25 of the spreadsheet that -- at Ms. Davis' deposition that

1       she tries to identify as corroborating -- or really, I  
2       think the "corroborating" language comes from the briefs,  
3       not from Ms. Davis.

4                  The first time we hear of that is in connection  
5       with this rebuttal report. And it wasn't provided.

6                  **THE COURT:** I guess -- I'm confused then. I  
7       thought I asked the question.

8                  The first you ever heard about it is with the  
9       rebuttal report. You're saying that it's --

10                 **MS. BLITZER:** No. Not the 38-percent figure,  
11       the -- this Excel spreadsheet that they're trying to  
12       identify as confirming the 38-percent number. I'm a  
13       little confused now, too.

14                 **THE COURT:** All right. So let's step back.

15                 You're telling me that Davis applies a  
16       38-percent deduction based on the McKinsey report.

17                 **MS. BLITZER:** Yes, a 62 percent deduction.

18                 **THE COURT:** Sixty-two. The opposite, right.  
19       Okay.

20                 So my question is: When did you first hear  
21       about that?

22                 **MS. BLITZER:** This document was --

23                 **THE COURT:** Not the document. When did you  
24       first hear that Davis is opining "I'm going to reduce by  
25       62 percent"?

1                   **MS. BLITZER:** In her rebuttal report.

2                   **THE COURT:** Okay. I will have to look at the  
3 transcript.

4                   So that's the first you hear about it. All  
5 right. So then, you question her, right, in a deposition?

6                   **MS. BLITZER:** Yes.

7                   **THE COURT:** All right. And so -- and she's  
8 only relying on two documents, both of which were produced  
9 to you no later than her rebuttal report.

10                  **MS. BLITZER:** Yes.

11                  **THE COURT:** All right.

12                  **MS. BLITZER:** That's right.

13                  **THE COURT:** Okay. And so the issue is whether  
14 relying on a McKinsey presentation to -- is it disputed,  
15 that the presentation was given to the CEO and the top  
16 executives of Alcon?

17                  **MS. BLITZER:** That's not in the record. I  
18 don't know who it was given to. I learned today --

19                  **THE COURT:** You could have asked that at the  
20 deposition. Was it asked at deposition?

21                  **MS. BLITZER:** We could have asked who it was  
22 given to, that's right.

23                  **THE COURT:** Right.

24                  **MS. BLITZER:** And that question was not asked  
25 at the deposition. But also, we haven't seen -- this data

1 was provided to McKinsey, right. This is a 2020 -- this  
2 litigation was already going on in July of 2020 when this  
3 was created.

4                   **THE COURT:** Did you ask for -- did you make a  
5 discovery request for that material?

6                   **MS. BLITZER:** Oh, we've had discovery requests  
7 and discovery meet and confers on IOL financial  
8 information going all the way back to August of 2021. We  
9 didn't say, is there a McKinsey presentation --

10                  **THE COURT:** So I asked you though -- see, this  
11 is the thing. This is why you've got to be careful.

12                  I asked you, I said: What's the basis of the  
13 motion?

14                  And you said 702.

15                  And then I asked you: What in 702?

16                  You said reliability.

17                  So you didn't say it's a Rule 26 motion. You  
18 didn't say there's any other justification to preclude  
19 this evidence from coming in. So it's going solely to  
20 reliability.

21                  **MS. BLITZER:** It is going solely to  
22 reliability, but it's also -- I also explained that it's  
23 contrary to law. And this is their burden.

24                  This is -- as you read earlier in the statute,  
25 this is very clearly Alcon's burden to prove their

1 deduction. These are real, hard numbers. They've paid  
2 these costs over the last decade. And the only evidence  
3 that they can provide for it is this McKinsey spreadsheet.

4 If you would let me just point to one more  
5 thing --

6 **THE COURT:** No. I'm not going to because --  
7 well, I'll read the briefs. I'll take a look at what you  
8 said. So I'll focus on that, actually, when I do the  
9 briefs, which is, is there something that the law requires  
10 to be more specific than this? In which case, maybe you  
11 have a good argument.

12 But if there's not cases that say -- that  
13 require that these deductions contemplated by 504(b). You  
14 have to be very, very specific. And given that the  
15 statute doesn't define "gross revenue," I have to say,  
16 going into it, I'll be surprised.

17 But I'll look at it with an open mind, and I'll  
18 decide both motions on the eve of trial, but as soon as I  
19 can.

20 All right. Now, we've got a pretrial  
21 conference coming up. When's that?

22 **MS. HEFFERNAN:** Next week.

23 **THE COURT:** Next week. And we'll see what I  
24 can do, if I can get a decision in by then. It's at 3:00?

25 **MS. HEFFERNAN:** It's 3:00 to 5:00 -- oh, well,

1 3:00 to -- whenever the Court will like to end it.

2                   **THE COURT:** I can't imagine we'll finish before  
3 5:00. And then I just saw some other papers. I forgot  
4 you guys have another set of lawsuits going on in front of  
5 me.

6                   **MR. LOCASCIO:** There are. There's the patent  
7 issues that were long-term stayed in this case.

8                   **THE COURT:** Right.

9                   **MR. LOCASCIO:** And then there's the separate  
10 case with two patents, which I believe is still on a  
11 motion -- a 101 motion from the other side that's just  
12 been on ice since then.

13                  **THE COURT:** And I'm going to just leave those  
14 to, let's get this trial done and then we will decide  
15 those.

16                  **MR. LOCASCIO:** How we proceed then.

17                  **THE COURT:** All right. That's what we will do.  
18 So you guys can also focus on trial prep.

19                  **MR. LOCASCIO:** Thank you, Your Honor.

20                  **THE COURT:** All right.

21                  **MR. MORIN:** Thank you, Your Honor.

22                  **THE COURT:** Anything else?

23                  **MR. LOCASCIO:** No. We'll see you next  
24 Wednesday.

25                  **MR. MORIN:** See you next Wednesday.

1                   **THE COURT:** Next Wednesday. All right. As  
2 always, I enjoyed the lawyering. Thank you very much.

3                   (The proceedings concluded at 2:30 p.m.)

4

5

6                   CERTIFICATE OF COURT REPORTER

7

8                   I hereby certify that the foregoing is a true and  
9 accurate transcript from my stenographic notes in the  
10 proceeding.

11

12                   /s/ Bonnie R. Archer  
13                   Bonnie R. Archer  
14                   Official Court Reporter  
15                   U.S. District Court

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MR. BLUMENFELD: [2] 3/7

3/12

MR. DAMLE: [55] 25/15

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MR. LOCASCIO: [5] 79/6

79/9 79/16 79/19 79/23

MR. MORIN: [22] 28/4 41/5

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MR. SHAW: [1] 3/14

MS. BLITZER: [21] 59/18

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76/12 76/17 76/21 76/24 77/6

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MS. HEFFERNAN: [130]

THE COURT: [226]

THE WITNESS: [1] 45/1

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